Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
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| Petition of Bell Atlantic Corporation | ) | CC Docket No. 98-11 |
| for Relief from Barriers to Deployment | ) | |
| of Advanced Telecommunications Services | ) | |
| | ) | |
| Petition of U S WEST Communications, Inc. | ) | CC Docket No. 98-26 |
| for Relief from Barriers to Deployment | ) | |
| of Advanced Telecommunications Services | ) | |
| | ) | |
| Petition of Ameritech Corporation | ) | CC Docket No. 98-32 |
| to Remove Barriers to Investment in | ) | |
| Advanced Telecommunications Capability | ) | |

**CONSOLIDATED REPLY COMMENTS OF SBC COMMUNICATIONS INC.**

SBC Communications Inc., on behalf of itself and its affiliates including its incumbent local exchange carrier subsidiaries that are Bell Operating Companies ("BOCs") (collectively, "SBC"), files these Reply Comments in the referenced proceedings instituted from petitions filed by Bell Atlantic, U S WEST, and Ameritech each seeking relief under section 706 of the Telecommunications Act of 1996 ("1996 Act"). SBC is limiting these Reply Comments to the most pertinent issues raised in the comments, and is not attempting here to address or refute every statement or argument made by commenters, especially those who oppose the petitions. Moreover, some comments have been directed to matters already being addressed in other Commission or State proceedings, and SBC generally will not again address those subjects here.

SBC can only surmise that those commenters believe that taking such an approach has, from their perspective, a "positive" effect on the Commission's decision-making processes. SBC trusts that the Commission will not have the knee-jerk reaction that some commenters are counting on. SBC instead fully expects the Commission will render a considered, reasoned, and lawful decision for each filed petition and the relief actually sought, free of prejudice or pre-disposition against any carrier or sub-category of carrier.

In determining the validity and weight of some of the criticisms of BOCs, however, the Commission should note the inconsistencies between those opposing the petitions and, indeed, sometimes within a single commenter's pleading. MCI's comments are particularly worth scrutiny. At one point, MCI claims that "xDSL technologies, for example, have been around for several years, but Ameritech and other BOCs have not, until now, shown any interest in deploying them for residential high-speed Internet access,"[4] but then, no more than two pages later, MCI explains that the "delay in xDSL deployment is generally due in part to technology maturity, integration with other systems, and customer demand. . . . ADSL technologies, for example, are in the final stages of standardization and deployment issue resolution."[5] Apparently MCI and other carriers -- except for BOCs -- are permitted to exercise prudent business judgment in investment and network deployment decisions, but a BOC is subject to strident criticism for the same decision.

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[4] MCI Comments, CC Docket No. 98-32, p. 18.

[5] Id., p. 20 n.21.

However, neither the Commission nor any party should interpret a failure to address an assertion as an admission, agreement, or a change in SBC's stated positions.

**The Commission Must See Through the Opposition's Rhetoric**

Each section 706 petition filed with the Commission must be judged on its own merits, in the context of the clear Congressional objective and mandate. However, rather than focusing on the specifics of the petitions, much of the opposition is in the form of apocalyptic predictions and broad overstatements of what will occur if the relief is granted. Those dire consequences -- none adequately explained, much less sufficiently supported -- run the gamut from the death of unbundling,[1] to the death of regulatory jurisdiction over voice traffic,[2] and, finally, to the death of competition in data and local services.[3] Sprinkled throughout such hyperbole are constant references and criticisms of the BOCs (notwithstanding the fact that much of the relief sought in the petitions is from obligations imposed upon incumbent LECs generally).

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[1] MCI, CC Docket No. 98-32, p. 8 ("With the requested relief, the BOCs would be able to preclude innovative competitors from purchasing unbundled xDSL-conditioned loops, or local loops capable of providing voice and enhanced service or loops and xDSL equipment.")

[2] WorldCom, CC Docket Nos. 98-11, 98-26, 98-32, p. 15 ("This unassailable fact [that voice can be transmitted by packet networks] would make it impossible to distinguish between data traffic and voice traffic for purposes of policing legal and regulatory distinctions.").

[3] *See, e.g.*, Id., p. 38 ("Plainly, then, the RBOCs' desire to invest in the Internet and advanced services, and their desire to be the only provider of those services within the reach of their local monopolies, are completely intertwined."); AT&T, CC Docket No. 98-25, ii ("US West's proposal would foreclose such competition from developing because once a customer subscribes to US West's advanced service, it will have no need for a separately-offered voice service.").

Elsewhere, MCI asserts "[t]he requirement to collocate in thousands of end offices -- only to serve what might be a handful of xDSL customers from a particular office -- is very time consuming and prohibitively expensive. . . . and requires significant up-front sunk [costs]"[6] but for BOCs, "xDSL technologies can be deployed without major up-front sunk costs, and therefore do not represent risky investments."[7] Obviously MCI believes that the same investment which may ultimately "serve what may be a handful of xDSL customers" is somehow inherently less risky when made by a BOC than by MCI. But even MCI's acquirer, WorldCom, "generally agrees with the proposition that it would be irresponsible for any carrier to invest in new plant without the reasonable expectation of customer demand to support it."[8]

In short, the Commission should obviously view the hyperbole, MCI's statements, and similar assertions in the context of competitors attempting to use the regulatory process to maintain the advantages they already have, and to gain more where possible.

**Section 706 Confers Substantive Authority Independent from Section 10**

The question of whether section 706 grants the FCC separate forbearance authority that is not subject to the limitations and restrictions of 47 U.S.C. § 160 (commonly referred to as "section 10") is a matter of vigorous dispute in these proceedings, as well as in *Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry And Notice of Proposed*

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[6] Id., pp. 13-14.

[7] Id., iii.

[8] WorldCom, CC Docket Nos. 98-11, 98-26, 98-32, p. 48.

*Rulemaking to Implement Section 706 of the 1996 Telecommunications Act*, RM 9244. SBC believes that section 706 does confer such authority independent of section 10, as explained in its Reply Comments in RM 9244 that were filed on May 4, 1998. Rather than repeat that analysis here, SBC attaches and incorporates into these Reply Comments a copy of its RM 9244 Reply Comments. *See* Attachment A.

**Acting on the Petitions Need Not Wait on the Proceeding Required by Section 706(b)**

A number of the commenting parties seek to delay these proceedings by tying action on the 706 petitions with the Commission's required section 706(b) proceeding.[9] The Commission should not countenance such a delay.

The mandate contained in section 706(a) was effective upon enactment; the requirement to encourage deployment of advanced telecommunications capability does not lay dormant until triggered by the first review under section 706(b). The structure of the statute clearly reveals that Congress intended the FCC to exercise its section 706(a) authority without regard to the inquiries required by section 706(b). If Congress had intended such a dependency, section 706(a) would not have been needed to be separate from 706(b) and, indeed, 706(b) could have been modified only slightly in order to eliminate 706(a) entirely. The fact that they are split can only lead to the

[9] *See, e.g.*, National Association of Regulatory Utility Commissioners, CC Docket Nos. 98-11, 98-26, and 98-32, p. 3; Focal Communications Corporation, Hyperion Telecommunications, Inc., KMC Telecom Inc. and McLeodUSA Incorporated, CC Docket Nos. 98-11, 98-26, and 98-32, pp. 11, 12.

conclusion that 706(a) provides the substantive direction and authority, and 706(b) was intended to provide minimal procedural and timing requirements.

Further, if 706(b) inquiries were the only vehicle through which the Commission could exercise 706(a), both the FCC and, more importantly, consumers would be required to wait until the next inquiry -- held at some indefinite interval -- was concluded. Such an interpretation of section 706(a) would also be completely inconsistent with the requirement that deployment be made on a "reasonable and timely basis" and such that advanced telecommunications capability is available to "all Americans." Section 706(a). The Commission's section 706(a) authority is clearly a continuous obligation, not a discrete one to be exercised only at regular intervals in accordance with some schedule.

Note that such a limiting interpretation would demonstrate an inequality of treatment of the FCC and State commissions under section 706. Only the FCC is required to hold section 706(b) inquiries; State commissions are not. A necessary implication of the conclusion that the Commission's authority may not be exercised until the conclusion of a section 706(b) inquiry is that State commissions were given more discretion and a greater role in the deployment of advanced telecommunications capability. With no section 706(b) inquiry acting as both a trigger and a limitation, a State commission can clearly act under section 706(a) at its discretion and as facts and policy warrant. SBC cannot believe that Congress intended to hamstring the FCC in this area in comparison to State commissions.

Moreover, as a matter of Commission discretion, refusing to address the 706 petitions would be ill-considered. It has been over two years since the 1996 Act became effective and there has been no widespread deployment of advanced telecommunications capability. For example, although various commenters have claimed the 706 petitioners have not sufficiently factually supported their requests, commenters -- many of which have the greatest incentive to demonstrate factually that the relief requested is not needed to achieve 706's objective -- are unable to show that widespread xDSL deployment is occurring. Instead, the record in these proceedings aptly supports a conclusion that technologies like ADSL are being rolled out slowly. What deployment that has occurred is on a limited geographic basis, with a clear focus on customers in metropolitan areas; availability in rural areas has been virtually non-existent. SBC submits that the deployment of advanced telecommunications capability cannot be considered "reasonable" or "timely" or to "all Americans" as Congress intends, and urges the FCC to act and act favorably on the petitions.

**Any Distinction between Advanced Telecommunications Capability and Advanced Telecommunications Services is a Distinction Without a Difference**

The Commission should reject any attempt to distinguish between advanced telecommunications capability and advanced telecommunications services. WorldCom tries to fault the petitioners for ignoring the fact that section 706 uses the phrase "advanced telecommunications capability" and that some (although not all) of the relief sought is aimed at

high-speed data services, and that the two are presumed to be equivalent.[10] Apparently, WorldCom believes that when Congress set the objective of the "deployment . . . of advanced telecommunications capability to all Americans," the mere presence of equipment was the objective, and that Congress did not care whether service was actually provided using the equipment.

Without belaboring the obvious, consumers do not want access to equipment capable of "high-speed, switched, broadband telecommunications capability" any more than they want access to a 5ESS voice switch. Consumers instead want the services provided or enabled by that equipment. Similarly, a carrier does not invest in such advanced telecommunications capability for the sake of investment or sheer joy of equipment ownership. Such deployment occurs because the carrier *intends* to use that advanced telecommunications capability to provide telecommunications services. Without appropriate incentives and regulatory relief for the services that would be provided using the capability, investment in the capability will be slow, especially in rural areas (assuming it occurs at all). The FCC therefore lawfully fulfills the Congressional objective of encouraging the deployment of the advanced telecommunications capability when it provides regulatory relief aimed at the capability (*e.g.*, unbundling), the service (*e.g.*, ADSL pricing flexibility), or both.

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[10] WorldCom, CC Docket Nos. 98-11, 98-26, 98-32, p. 27.

**These Proceedings Are Not a Proper Forum to Address Perceived Deficiencies with Commissions Rules, Negotiated Agreements, or Arbitration Results**

More than one commenter took these proceedings as an opportunity to complain about the implementation of collocation under the 1996 Act and the FCC's rules and, in at least one instance, the 1996 Act itself.[11] Although SBC generally believes that those complaints are far beyond the scope of these proceedings, SBC feels that it must respond to the unfounded criticisms of Pacific Bell ("Pacific") leveled by Covad even though the same matters are already being addressed between the companies and before the California Public Utilities Commission.

All of Covad's complaints on "collocation" are really only directed at physical collocation, and then in two areas: space limitations and reasonable security measures. Notwithstanding the impression that might be left with the Commission, Pacific has over 300 physical collocation cages occupied by carriers. In the major California metropolitan areas alone, Pacific has 170 arrangements spread over 50 wire centers. And as even Covad must acknowledge, Pacific is providing physical collocation for Covad's ADSL-providing equipment in Pacific's central offices.

However, the space available for physical collocation in any particular central office or other premises is not limitless, and demand for space is always greatest in the metropolitan areas where carriers like Covad selectively chose to provide their services. At some point, there is no more space available for physical collocation. Inevitably then, there will be central offices and

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[11] *See* Covad, p. 8 n.17 where Covad complains about the different cost-based prices set under section 252 by the Texas Public Utility Commission and the Illinois Commerce Commission for unbundled loops within the Houston and Chicago metropolitan areas.

other premises where physical collocation requests cannot be accommodated and will be rejected.

There is nothing even remotely violative of any 1996 Act or Commission rule obligation about those rejections. Both the 1996 Act and the Commission rules recognize that there will be instances where space will not be available for physical collocation[12] and, accordingly, has made virtual collocation an alternative in those situations. Of course, even with virtual collocation, space must be available for the equipment to be virtually collocated (although Pacific has not rejected a request for virtual when space was not available for physical). Thus, there is absolutely nothing inconsistent between not having space available for physical collocation and yet still having equipment space available whether for a collocator's equipment or the incumbent LEC's own equipment. Covad's attempt to insinuate some inherent inconsistency between Pacific's rejection of Covad's physical collocation application for a particular central office and Pacific's own installation of similar equipment in that same central office is based upon a false premise and utterly fails. In sum, the facts and law simply do not bear the weight of Covad's accusations and implications.

Covad apparently hopes that its approach can lay a foundation for its desire for "cageless" physical collocation. As contemplated by Covad, such an arrangement would fail to provide for reasonable security measures. The current security measures employed in central offices by

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[12] 47 U.S.C. § 251(c)(6) ("the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."); 47 C.F.R. § 51.323(f).

Pacific have been judged reasonable by both the FCC and the CPUC (*e.g.*, caged space, secured passageways, card readers). Cageless collocation has been evaluated by SBC, and it raises several concerns about the lack of sufficient security to incumbent LEC networks. Moreover, based upon negotiations under the 1996 Act, SBC believes that most collocators are just as concerned about the access to their collocated equipment that non-authorized personnel have (whether incumbent LEC personnel or the personnel of other collocators).[13]

The security and implementation concerns associated with cageless collocation are many. Card key access alone to secured floors is an insufficient method of security, inasmuch as such access can be circumvented by blocking doors and by trading or giving cards to others. In such cases, there is an insufficient basis to identify the person who has entered the incumbent LEC's secured premises. Similarly, the suggestion to use cameras assumes that they actually capture a sufficient image of everyone who enters and of their activities, and perhaps even that the incumbent LEC have someone actively monitoring and maintaining the system on a real-time basis. SBC's experience indicates the difficulty of positioning cameras to see every person's face and the work being performed at the same time. To obtain a level of security that even approaches acceptable, several cameras positioned in various locations would be required, and perhaps special scanners to identify when each collocator was performing work. All of this activity adds costs that must be recovered from the collocators. And, unlike the current

[13] However, where a carrier indicate a willingness to share space with other collocators, SBC has no objection to such arrangements assuming reasonable terms and conditions (including limitations of liability provisions) can be negotiated. In fact, Covad's interconnection agreement with Pacific does permit Covad to use a shared cage.

measures, there would be a greater percentage of on-going recurring costs and hence higher monthly collocation charges.

Although data from card keys and cameras can be reviewed after a problem has occurred,[14] that is perhaps the biggest problem -- such measures may permit the identification of

[14] Assuming, of course, that the data still exists. The information collected from these mediums generally overwrite data or purge themselves after a period of time.

the perpetrator (like an ATM camera), but are not as preventative as the current measures. In other words, the damage will have been done, and merely having someone to blame and perhaps obtain recovery from is a poor solace to carrier and end-user alike.

**Conclusion**

The Commission should not wait until the conclusion of the section 706(b) inquiry but rather should promptly consider 706 petitions, judging each on its own merits. SBC believes that the petitions filed by Bell Atlantic, U S WEST, and Ameritech each deserve favorable decisions in order to further the Congressional objective established by section 706.

Respectfully submitted,

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May 6, 1998

Attachment A

Before the
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| In the Matter of | ) | |
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| Petition of the Alliance for Public | ) | |
| Technology Requesting Issuance of | ) | RM 9244 |
| Notice of Inquiry And Notice of | ) | |
| Proposed Rulemaking to Implement | ) | |
| Section 706 of the 1996 | ) | |
| Telecommunications Act | ) | |

**REPLY COMMENTS OF**
**SBC COMMUNICATIONS INC.**

SBC Communications Inc., on behalf of itself and its affiliates including its incumbent local exchange carrier ("LEC") subsidiaries that are Bell Operating Companies ("BOCs") (collectively, "SBC"), files these Reply Comments regarding the Alliance for Public Technology's February 18, 1998, Petition ("APT Petition"). With these Reply Comments, SBC demonstrates that section 706 confers substantive authority on the Commission, independent of the requirements or limitations of section 10. To interpret section 706 otherwise would violate fundamental principles of statutory construction and fail to give effect to the express will of Congress.

The comments revealed a predictable difference of opinion on the issue of whether section 706 constitutes a separate grant of authority to the Commission. SBC submits that any reading that attempts to make section 706 dependent upon or otherwise subject to section 10

ignores the plain language of section 706, would not permit sections 10 and 706 to be reconciled in a manner that gives meaning to the words used in each,[1] and would reach an absurd result.[2]

The goal of interpreting a statute is, of course, to effectuate the intent of Congress, and the best evidence of that intent is the statutory language itself. Section 706(a) states that:

> *The Commission* and each State commission with regulatory jurisdiction over telecommunications services *shall encourage* the deployment on a reasonable and timely basis of advanced telecommunications capability *to all Americans* (including, in particular, elementary and secondary schools and classrooms) by utilizing, *in a manner consistent with the public interest, convenience, and necessity*, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. (emphasis added)

Like WorldCom, SBC believes that the precise language of section 706 is worth parsing in some detail; unlike WorldCom, however, SBC asserts that the conclusion that must be drawn from the language is that section 706 is a separate grant of substantive authority to the FCC.

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[1] Statutes are to be construed to give meaning to each word enacted by Congress. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). The Commission has cited and relied upon this principle in construing the 1996 Act. *See The Public Utility Commission of Texas, et al., Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCB Pol 96-13, 96-14, 96-16, and 96-19, Memorandum Opinion and Order, FCC 97-346, ¶ 43 (October 1, 1997) ("It is a fundamental principle of statutory construction that 'every word and clause must be given effect'".); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, 11 FCC Rcd 21905, ¶ 156 (1996) ("This conclusion [that "operate independently" imposes separate requirements] is based on the principle of statutory construction that a statute should be construed so as to give effect to each of its provisions.").

[2] *See* United States v. Turkette, 452 U.S. 576, 580 (1981) ("absurd results are to be avoided").

First and foremost. Congress has mandated Commission action. The term "shall" imposes a requirement, and not a matter of discretion.[3] WorldCom's inordinate focus of where that "shall" command was codified misses the point entirely. A mandate imposed by Congress on the Commission is a mandate regardless of where it may reside in the United States Code or even whether it was codified there at all. There is no "hierarchy" of laws based upon how the law is codified that permits the FCC to rank mandates in varying levels of importance. Section 706 was a law properly enacted by Congress and signed by the President, and is accorded no less respect as a law of the United States due to what is effectively a numbering issue.[4] The Bill of Rights amended the United States Constitution, yet the Supreme Court has hardly treated those contemporaneous declarations as stereotypical stepchildren because they were not placed in the body. The Commission must obey that section 706 mandate regardless of where it is found, and give it equal status in its implementation as the FCC has other mandates of the 1996 Act.

That mandatory action is to "encourage," a word choice that cannot be overlooked or overemphasized. SBC agrees with WorldCom that the plain meaning of "encourage" is "to spur on" and "to give help or patronage to."[5] But WorldCom seeks to downplay the word by

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[3] *See, e.g.*, Assoc. of American Railroads v. Costle, 562 F.2d 1310 (D.C. Cir. 1977). Although courts sometimes construe "shall" as discretionary in certain contexts, that interpretation cannot be made in a context where the mandatory direction in section 706(a) is followed in section 706(b) by a mandatory process with deadlines to discharge that direction.

[4] There already existed a 47 U.S.C. § 706 when the Telecommunications Act of 1996 ("1996 Act") was passed.

[5] WorldCom, p. 10 (citing Webster's II New Riverside University Dictionary (Houghton (continued...)

claiming "the FCC is directed only to 'encourage' deployment," WorldCom. p. 10, and then essentially ignores the word choice Congress made and the resultant need for affirmative Commission action that provides encouragement. The FCC does not have that luxury. The FCC cannot "spur on" or "give help" to the deployment of advanced telecommunications capability by doing nothing, or just talking about its desire for deployment. Congress envisioned specific FCC action targeted at providing incentives to infrastructure investment in those technologies; passivity to that Congressional objective -- and especially where deployment is lacking -- cannot meet the base requirement of the Commission's affirmative section 706 obligation. Likewise, blind devotion to regulatory prohibitions, restrictions, and limitations to the detriment of that objective also cannot be countenanced under the plain language of section 706.

Further, Congress clearly indicated that incumbent LECs were not to be excluded from section 706 relief as some commenters wish. The Commission has been given broad authority to "utilize . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Section 706(b). Obviously, the fact that Congress specifically authorized the use of "price cap regulation" as a tool demonstrates that section 706 relief was authorized for incumbent LECs since only they are subject to earning regulation; Congress

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[5](...continued)
Muffin Co. 1988). Other dictionaries are in accord. *See* Random House Unabridged Dictionary (2d ed. 1993) ("encourage" means "to stimulate by assistance, approval, etc.").

clearly did not authorize "price cap regulation" for non-dominant carriers that, as a class, are not subject to any earning regulation before (or since) passage of the 1996 Act.

Some commenters trumpet the fact that the section 706 authority must be used "in a manner consistent with the public interest, convenience, and necessity"[6] -- recognized by WorldCom as a "classic public interest test."[7] Far from being supportive of those who argue against separate section 706 authority, however, that requirement conclusively demonstrates independence from section 10.

The reason is that section 10 has its own "public interest" test. *See* section 10(a)(3) ("consistent with the public interest"). Under the interpretation urged by those who oppose the APT petition, section 706 is subservient to section 10, and that the use of "forbearance" in section 706 is only a reference to the Commission's authority in section 10(a).[8] Those commenters then depend upon the fact that section 10(a) authority cannot be used to forbear from sections 251(c) and 271 requirements until those requirements have been "fully implemented." What those commenters fail to address is that such an interpretation would render the public interest test in either section 10(a) or section 706 superfluous or redundant, thus violating the fundamental tenet of statutory construction that every word in a statute should be given

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[6] WorldCom, p. 11, NARUC, p. 4.

[7] WorldCom, p. 11.

[8] *See* LCI, Attachment A, p. 18; Sprint, p. 4.

meaning.[9] To give each test meaning requires that section 706 be treated as a separate grant of authority.

Similarly, to construe section 706's "public interest" test as somehow in addition to section 10's (and that both must be met) would be to conclude that Congress intended an absurd result. In essence, that interpretation would mean that Congress intended that one (section 706) would only act as a filter that would first have to be passed before one could even get to the second (section 10). Those commenters would thus have the FCC conclude that, in the context of an infrastructure investment goal so important to Congress that it established a separate mandate to affirmatively encourage deployment, Congress wanted to make forbearance *more difficult to obtain*. After all, without section 706, the Commission can grant forbearance from "any regulation or any provision of the [Communications Act of 1934, as amended]" under section 10(a) and apply only its single three-part test. Under the formation of those who oppose

[9] The fact that "public interest" tests are worded differently provides no basis for arguing the two are different legal standards and that both can somehow be given effect because of such a difference. Neither the Commission nor the court have differentiated between the various formulation of the "public interest" test. *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, 12 FCC Rcd 20543, ¶ 384 n.989 (1997) (various statutory "public interest" formulations referred to as "consistent with the public interest, convenience, and necessity"); *Consolidated Application of American Telephone and Telegraph Company and Specified Bell System Companies for Authorization Under Sections 214 and 310(d) of the Communications Act of 1934 for Transfers of Interstate Lines, Assignments of Radio Licenses, Transfers of Control of Corporations Holding Radio Licenses and Other Transactions as Described in the Application*, 96 F.C.C. 2d 18, ¶ 66 n.73 (1983) ("neither the courts nor this Commission appear to have placed any significance upon the different [public interest] language [in 47 U.S.C. §§ 214, 310(d)] and many cases use the terminology interchangeably"); Office of Communication of the United Church of Christ v. FCC, 826 F.2d 101, 106 (D.C. Cir. 1987) (the Court equates various formulations of "public interest" standard).

APT's interpretation, the FCC would have to apply another test and then still apply the section 10 test. Under that interpretation, the FCC could find that a proposed request for forbearance was in the "public interest" under section 706 -- thus meeting the Congressional objective -- but not under section 10(a), and thus would be required to deny the request. Such a formulation is both fanciful and nonsensical to say the least.

Instead, Congress established section 706 authority for an entirely different purpose than section 10 authority and correspondingly set an different standard for its exercise. The purpose of section 706 is succinctly embedded in the provision itself -- to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans".[10] In contrast, the purpose of section 10 is to eliminate regulation where it is no longer needed. Because these are two fundamentally different objectives, with no logical or other relationship, Congress accordingly established two separate standards for the use of the authority granted in each. Forbearance under section 10 must meet a three-part test, only one part of which is the

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[10] The Senate history on section 304 of S.652, the precursor to section 706 that had no counterpart in the House Bill, only serves to reinforce that strong message.

> Section 304 of the bill is *intended to ensure* that one of the primary objectives of the bill -- to accelerate deployment of advanced telecommunications capability -- is achieved. . . . The Committee believes that this provision is *a necessary failsafe* to ensure that the bill will achieve its intended infrastructure objective.

Senate Report on S. 652 (Report No. 104-230), p. 50 (emphasis added). The "Joint Explanatory Statement of the Committee of Conference" noted that "[t]he conference agreement adopted the Senate provision with a modification." Conference Report on S. 652 (Report No. 104-458), p. 210.

public interest; section 706 forbearance must only be in the public interest. Neither was textually made dependent on the other, and cannot reasonably or logically be so read.

Finally, those arguing against independent 706 authority ignore the fact that the Congressional goal is intended to benefit "all Americans (including, in particular, elementary and secondary schools and classrooms)". When the 1996 Act was written, Congress understood that competition would be slow, perhaps extremely slow, to come to more rural, insular areas.[11] Under the interpretation urged by those opposing APT's petition, the FCC would be legally precluded from forbearing from section 251(c) requirements until "fully implemented" by a rural incumbent LEC notwithstanding the need for relief to encourage investment by that rural incumbent. In other words, those opposing -- new entrants chief among them -- want the

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[11] *See, for example*, 142 Cong. Rec. E238, Hon. Lee H. Hamilton, Representative from Indiana ("The bill contains protections for rural communities, which may see less competition because of the high cost of providing service to these areas."); 141 Cong. Rec. S 17847, Hon. Byron L. Dorgan, Senator from North Dakota ("[T]he market system is not going to decide that the income stream in a rural State is going to persuade people to come and engage in robust competition to provide new services in rural areas. . . . One [concern] is, you do not have competition in many rural areas. Often you have a circumstance where you only have one interest willing to serve, and that service sometimes has to be required. The economics simply do not dictate service."). This understanding, which has been confirmed by experience in the two years since passage of the 1996 Act, has been recognized by the FCC as well. *See Access Charge Reform: Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, 12 FCC Rcd 15982, ¶ 331 (1997):

> Small and rural LECs will most likely not experience competition as fast as incumbent price cap LECs. We do not expect small and rural LECs generally to face significant competition in the immediate future because, for the most part, the high cost/low-margin areas served by these LECs are unlikely to be the immediate targets of new entrants or competitors.

exercise of section 706 authority for incumbent LECs to be partially conditioned on the new entrants' own business plans and decisions (*e.g.*, when, where, and how to enter a local exchange market).[12] SBC submits that Congress did not condition section 706 so as to permit rural America to be held hostage to new entrants who cannot find enough cream to skim to make rural areas worth their while.[13] In fact, so important was the goal of deploying advanced telecommunications capability that Congress included the same concept as a principle of universal service, with a special emphasis for schools and libraries. *See* 47 U.S.C. §§ 254(b)(2), (6). Section 706 must be read as providing independent authority, separate and distinct from section 10, in order to ensure that "all Americans" are included in the on-going technology revolution.

**Conclusion**

In sum, Congress has directed affirmative action by the Commission to actively spur on deployment of advanced telecommunications capability for "all Americans". To do so, Congress

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[12] In light of the approach taken by the Commission in determining whether a BOC has met the section 251(c) portions of the competitive checklist of section 271, those new entrants are undoubtedly counting on their interpretation coupled with the "fully implemented" language of section 10(d) to block an incumbent LEC from getting relief it may need from section 251(c) or 271 to deploy the Congressional-favored technologies notwithstanding the detrimental effect on achieving the objective of section 706.

[13] The legislative history is to the contrary. *See* 141 Cong. Rec. S 7942, Hon. Ted Stevens, Senator from Alaska ("We are talking about telecommunications connections which will enable people in rural America to have computer services just like everyone else."); 142 Cong. Rec. H 1145, Hon. Blanche Lambert Lincoln, Representative from Arkansas ("[M]y primary concerns during these negotiations and among the conferees has been ensuring that people who live in rural areas will have access to the same advanced technology and competition that we are seeking for the country and at affordable prices.").

granted the FCC separate authority under section 706 that is not subject to the standards and limitations of section 10. The Commission thus has an obligation to encourage incumbent LECs -- including those that are also BOCs -- to deploy advanced telecommunications capability and to use the regulatory tools authorized by section 706 to so encourage.

Respectfully submitted,

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May 4, 1998

## CERTIFICATE OF SERVICE

I, Mary Ann Morris, hereby certify that the foregoing, " CONSOLIDATED REPLY COMMENTS OF SBC COMMUNICATIONS INC.," in CC Docket Nos. 98-11, 98-26 and 98-32 have been filed this 6TH day of May, 1998 to the Parties of Record.

Mary Ann Morris

May 6, 1998

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